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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D2

[redacted]

FILE: WAC 03 131 50012 Office: CALIFORNIA SERVICE CENTER Date: JAN 18 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Michael T. Kelly
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a mortgage broker that seeks to employ the beneficiary as an accountant. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because: (1) the proffered position is not a specialty occupation; and (2) the beneficiary is not qualified to perform the duties of a specialty occupation. On appeal, counsel submits a brief and additional and previously submitted evidence.

The AAO will first consider whether the proffered position is a specialty occupation.

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as an accountant. Evidence of the beneficiary's duties includes: the Form I-129; the attachments accompanying the Form I-129; the company support letter; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail budget planning, cost accounting, and financial analysis; preparing management and government reports; analyzing financial information and preparing financial reports; documenting business transactions; analyzing financial information detailing assets, liabilities, and capital; preparing balance sheets, and profit and loss statements; auditing contracts, orders, and vouchers and preparing reports to substantiate individual transactions prior to settlement; and establishing, implementing, and modifying accounting and accounting control procedures. The petitioner indicated that a candidate for the proffered position must possess a bachelor's degree or its equivalent, and stated that the beneficiary's education and experience qualify her for the proffered position.

The director determined that the proffered position was not a specialty occupation, and that the beneficiary was not qualified to perform the duties of an accountant. According to the director, the petitioner did not submit all requested evidence such as documentation to support its claim of employing 12 persons. The director determined that because the petitioner did not employ a bookkeeper or accounting clerk, the beneficiary would perform many of these non-qualifying duties. The director stated that when adjudicating a petition, factors considered include the proffered position's duties combined with the facts surrounding the petition such as the nature of the petitioner's business, the industry practice, and the beneficiary's education, work experience, and salary. The director explained that the fact that the beneficiary possesses a degree in a related field does not guarantee that a position is a specialty occupation. Furthermore, the director stated that performing specialty occupation duties that are incidental to a position's primary function would not establish that the position qualifies as a specialty occupation. According to the director, many of the beneficiary's duties are performable by a person without a baccalaureate degree. The director found that the petitioner's evidence did not establish that the beneficiary was qualified to perform the duties of an accountant. Finally, the director found discrepancies in the evidentiary record.

On appeal, counsel states that as described in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*), the proffered position's duties are performed by an accountant. Counsel states that the director erroneously concluded that the beneficiary would perform many non-qualifying duties, and maintains that none of the beneficiary's responsibilities are extraneous to those of an accountant. Counsel distinguishes the proffered position from bookkeeping, accounting, and auditing clerk jobs by stating that the beneficiary will advise the petitioner about tax strategies, develop and implement a financial system, and interpret accounts and records. Counsel contends that clerks merely record, compute, and generate statements. Counsel declares that the petitioner has nearly one million dollars in income and that it will not hire a bookkeeper or other clerical staff because a prior bookkeeper stole from the petitioner.

Counsel explains that the complexity of the petitioner's structure and the fact that it will soon become a direct lender, requires it to employ an accountant to review corporate financial records and devise, implement, and maintain systems for general accounting. According to counsel, the petitioner had complied with the request for evidence when it provided the DE-6 Quarterly Wage Reports. Counsel states that the director failed to request the petitioner's 1099 Forms. Finally, counsel contends that because the beneficiary's transcript was sealed, the petitioner was unaware that the person who signed the transcript was different from the person who signed the outside of its sealed envelope, and maintains that the petitioner also was unaware that the transcript had no phone number or that the director required one. Counsel emphasizes that the beneficiary holds a foreign degree determined to be equivalent to a U.S. bachelor's degree, which is required by the specialty occupation.

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The AAO first considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(*1*) and (*2*): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

In determining whether a position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

A review of the *Handbook* reveals that specific job duties vary widely among the four major fields of accounting: public, management, government, and internal. The closest category to the proffered position is the management accountant. In the *Handbook,* management accountants — also called cost, managerial, industrial, corporate, or private accountants — record and analyze the financial information of the companies for which they work. Other responsibilities include budgeting, performance evaluation, and cost and asset management. Usually, management accountants are part of executive teams involved in strategic planning or new-product development. They analyze and interpret the financial information that corporate executives need to make sound business decisions. They also prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities. Within accounting departments, they may work in various areas, including financial analysis, planning and budgeting, and cost accounting.

Some of the duties described in the *Handbook* do not apply to the proffered position. According to the *Handbook*, accountants prepare financial reports for nonmanagement groups, including stockholders, creditors, regulatory agencies, and tax authorities, and usually, they are part of executive teams. The beneficiary will not be part of an executive team. Nor will the beneficiary prepare financial reports for nonmanagement groups such as stockholders, creditors, regulatory agencies, and tax authorities; or be involved in performance evaluation. Given this significant dissimilarity, the scope and complexity of the beneficiary's duties and responsibilities do not rise to the level of an accountant. Consequently, a bachelor's degree in accounting or a related field – which the DOL states is required for a management accountant – would not be required for the proffered position.

The AAO notes that the director properly observed the inconsistency in the evidentiary record about the petitioner's claim to have 12 employees. The petitioner's quarterly state report of wages paid to each employee for the quarter ending September 30, 2003 indicated that it had only 3 employees. In the appeal brief, counsel claims that the petitioner's "other employees are independent contractors." This statement does not explain the inconsistency in the record because independent contractors are not employees. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

There is no evidence in the record to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations or that the particular position is so complex or unique that it can be performed only by an individual with a degree. Again, the beneficiary's duties do not rise to the level of the duties performed by an accountant as described in the *Handbook*.

Because the proffered position is newly created, the petitioner cannot establish that it normally requires a degree or its equivalent for the position. 8 C.F.R. § 214.2(h)(4)(iii)(A)(*3*).

There is insufficient evidence in the record to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(*4*) which requires that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. As already discussed, the beneficiary's duties do not rise to the level of those performed by an accountant as described in the *Handbook*. Consequently, the petitioner fails to establish the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition on this ground.

The AAO will now discuss whether the beneficiary is qualified to perform the duties of the proffered position.

The director found that the petitioner failed to submit evidence that would establish that the beneficiary is qualified to perform the duties of an accountant. However, given that the duties of the proffered position do not rise to the level of the duties performed by an accountant, a bachelor's degree in accounting or a related field – which the DOL states is required for a management accountant – would not be required for the proffered position. Consequently, the beneficiary would be able to perform the proffered position.

The AAO notes that in the request for evidence the director specifically sought an original of the beneficiary's school transcript, and requested that a "school official must sign the transcript and the outside of the sealed envelope." In the denial, the director stated that the transcript did not indicate a phone number for the school, and that the petitioner's failure to provide a sealed transcript with [redacted] signature on the transcript and the outside of a sealed envelope cast doubt upon the validity of the transcript. In the appeal brief, counsel states that because the beneficiary's transcript was sealed, the petitioner was unaware that the person who signed the transcript was different from the person who signed the outside of its sealed envelope, and that the petitioner also was unaware that the transcript had no phone number or that the director required one. Counsel's explanation regarding the transcript is reasonable, removing any doubt cast upon its validity.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.